

FCC MAIL SECTION

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SEP 8 10 56 AM '98 Federal Communications Commission

FCC 98D-3

DISPATCHED BY Before the
Federal Communications Commission
Washington, D.C. 20554

In re) CIB DOCKET NO. 98-48
)
JERRY SZOKA)
Cleveland, Ohio)
)
Order to Show Cause Why a Cease)
and Desist Order Should Not Be Issued)

Appearances

Hans Bader, on behalf of Jerry Szoka; James Shook, Richard Lee, Pamera D. Hairston, and Jackie Ellington, on behalf of the Compliance and Information Bureau.

**SUMMARY DECISION
OF
CHIEF ADMINISTRATIVE LAW JUDGE JOSEPH CHACHKIN**

Issued: September 2, 1998

Released: September 4, 1998

Preliminary Statement

1. The Order to Show Cause and Notice of Opportunity for Hearing, FCC 98-64, released April 6, 1998 (Show Cause Order), specified two issues.

- a. To determine whether Jerry Szoka has transmitted radio energy without appropriate authorization in violation of Section 301 of the Act.
- b. To determine whether, based on the evidence adduced pursuant to the preceding issue, Jerry Szoka should be ordered to cease and desist from violating Section 301 of the Act.

The Show Cause Order also provides that, without regard to the issuance of a cease and desist order, it should also be determined whether Jerry Szoka should forfeit \$11,000 for violations of Section 301 of the Act.

2. On June 10, 1998, the Chief, Compliance and Information Bureau (Bureau) moved for summary decision on the issues specified. On July 28, 1998, Szoka filed his Opposition to the motion for summary decision.¹

FINDINGS OF FACT

3. The pertinent facts are not in dispute. Jerry Szoka (Szoka) is the owner and/or operator of "The Grid", a nightclub located at 1281 West 9th Street, Cleveland. From November 4, 1996, to the present, Szoka has operated an FM radio station known as "The Grid" at 1281 West 9th Street, Cleveland, Ohio. "The Grid" transmits on 96.9 MHz. Bureau Motion, Exhibits 1 and 2.²

4. Szoka does not hold an authorization from this Commission to transmit radio energy on 96.9 MHz at Cleveland, Ohio. Notwithstanding the absence of any authorization from the Commission, Szoka has transmitted at a signal strength which has uniformly exceeded 250 microvolts/meter at 3 meters.³ Broadcasts that exceed 250 microvolts/meter at 3 meters require a license. Szoka received written warnings in February and June 1997, from James A. Bridgewater, the Detroit Field Office Director of the Commission's Compliance and Information Bureau, that his operation of a radio station on 96.9 MHz violated Section 301 of the Communications Act. The letters also informed Szoka that unlicensed operation could subject him to penalties including for a first offense a maximum fine of \$10,000 or one year imprisonment or both; and for subsequent offenses, a maximum fine of \$10,000 or two years imprisonment or both. Bureau Motion, Exhibit 3, Attachments A and C. Szoka ignored the written warnings; he has continued his unauthorized operation up to the present time.

CONCLUSIONS

5. Section 1.251 of the Commission's Rules provides for the grant of a motion for summary decision where there is no genuine issue of material fact for determination at hearing. New Broadcasting Corp., 44 FCC 2d 38 (Rev. Bd. 1973). In order to sustain such a motion, the burden is on the moving party to demonstrate that no genuine issue as to any material fact remains and that it is otherwise entitled to summary decision. Therefore, it must be established that "the truth is clear," that "the basic facts are undisputed," and that "the parties are not in

¹ Szoka's response was due on June 24, 1998. By Orders FCC 98M-87 and FCC 98M-102, the Presiding Judge granted Szoka's requests to extend the time until July 28, 1998.

² Szoka asserts in his declaration that the radio station went on the air in September of 1995 and now broadcasts seven days a week. Declaration of Szoka dated 7/24/98, page 1.

³ Field strength measurements taken on September 11, 1997 of the signal identified as "The Grid" made approximately 171 meters (561 feet) from the transmitting antenna revealed a value of 35.55 millivolts/meter far exceeding the required 250 micorvolts/meter at distance of 3 meters limited for compliance of 47 C.F.R. §15.239(b). Bureau Motion, Exhibit 4, Attachment A.

disagreement regarding material factual inferences that may be properly drawn from such facts." Big Country Radio, Inc., 50 FCC 2d 967 (Rev. Bd. 1975). The Bureau's motion demonstrates that no genuine issues of any material fact remain. Therefore, disposition of this case by summary decision is appropriate.

6. Issue a, the sole evidentiary issue, calls for a determination whether Szoka has transmitted radio energy without appropriate authorization in violation of Section 301 of the Act. Section 301 of the Communications Act of 1934, as amended (the Act), 47 U.S.C. §301, provides in pertinent part that no person shall operate any apparatus for the transmission of communications by radio from one place in any state to another place in the same state without a license from this Commission. The only pertinent exception to this blanket restriction for operation in the FM frequency band (88 MHz to 108 MHz) is found in Part 15 of the Commission's Rules, specifically, Section 15.239(b), 47 C.F.R. §15.239(b), which provides that the field strength of any such emissions shall not exceed 250 microvolts/meter at 3 meters.

7. Szoka has admitted operating a radio station in the state of Ohio. In this regard, Szoka asserts that the radio station has broadcast continuously since it went on the air in September 1995. Also, Szoka admits that the power used was in excess of that specified in Part 15 of the Commission's Rules. Accordingly, issue (a) is summarily resolved against Szoka.

8. Issue b calls for a determination whether, based on the evidence adduced, Szoka should be ordered to cease and desist from violating Section 301 of the Act. Section 301 of the Act requires a license in order to broadcast and the Commission has no authority to waive that statutory requirement. 47 U.S.C. §301.⁴ Szoka does not hold a license to operate a broadcast station. Szoka is therefore, ordered to cease and desist from violating Section 301 of the Act.

9. Szoka contends that he is not required to comply with Section 301 because the Commission refusal to license stand-alone audio broadcast stations under 100 watts violates his First Amendment rights and is inconsistent with the statutory mandate to regulate in the public interest. Szoka's argument is similar in essential respects to that made and rejected in United States of America v. Dunifer, 997 F. Supp. 1235 (N.D. Cal. 1998) (permanent injunction granted against unlicensed radio station in Berkeley, California); See also, Stephen Paul Dunifer, 11 FCC Rcd 718 (1995). Szoka's arguments are similarly rejected.

10. Section 301 specifically prohibits the transmission of radio communications without a license. The right of free speech does not include the right to use radio facilities without a license. The requirement for a license in order to broadcast has been upheld by the Supreme Court as a proper exercise of the constitutional power of Congress over Commerce, U.S. v. Dunifer, *supra*, at 1241, citing National Broadcasting Co. v. United States, 319 U.S. 190, 227 (1943). There is no requirement for a showing of harmful interference before the statute can be enforced. Stephen Paul Dunifer, 11 FCC Rcd at 727. Szoka, like Dunifer, has never applied for

⁴ Szoka's qualities as a broadcaster, and the value of his programming are immaterial.

a broadcasting license or a waiver of the regulations disallowing applications by Class D broadcasters. Like Dunifer, he has no standing to challenge the regulations. U.S. v. Dunifer at 1241. Additionally, Szoka's claim that it would be futile to seek a waiver is denied for the reasons recited in the Dunifer case. As noted there, the Commission has granted two waivers to Class D broadcasters. See U.S. v. Dunifer, at 1240. In sum, contrary to Szoka's assertions, Szoka is required to comply with Section 301 and has shown no justification for his failure to do so. A cease and desist order to stop further violations of Section 301 is mandated.

11. The Show Cause Order also requires a determination pursuant to Section 503(b) of the Act, whether an Order For Forfeiture in an amount not to exceed \$11,000 shall be issued against Szoka for the violations of Section 301 of the Act. In this regard, Section 503(b)(2)(c) of the Act provides for a forfeiture in an amount not to exceed \$11,000 for each day of a continuing violation not to exceed \$82,500 for any single act or failure to act. 47 U.S.C. §503 (b)(2)(C). In determining a forfeiture penalty, there is to be considered "the nature, circumstances, extent, and gravity of the violation and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require." 47 U.S.C. §503 (b)(2)(D).

12. The violations in this case have been willful and repeated. Further, these violations have occurred despite explicit and repeated warnings to Szoka that his operation of a radio station violated Section 301 of the Act and could subject him to fine and imprisonment. Szoka has not heeded these warnings. He has made no good faith efforts to come into compliance with the Communications Act or the Commission's rules. He has willfully continued to illegally operate the station up to the present time. Szoka's willful refusal to obey the law can not be condoned or excused in any manner. The Presiding Judge agrees with the Bureau that the nature, circumstances, extent and gravity of Szoka's misconduct warrants a forfeiture in the amount of \$11,000.

13. Szoka contends that an \$11,000 forfeiture is unconstitutionally excessive because it bears no relationship to the gravity of the offense. Szoka also contends that the imposition of a \$11,000 forfeiture violates the Small Business Regulatory Enforcement Fairness Act. It is further argued that the forfeiture is so punitive it cannot be imposed without affording Szoka Constitutional safeguards.

14. Szoka's contentions are rejected. Initially, imposition of a forfeiture is civil and not a criminal penalty. Moreover, the statutory scheme authorizing the FCC to enforce forfeitures in the amounts specified in Section 503(b) of the Act contains appropriate safeguards which satisfy due process requirements and passes Constitutional muster. See U.S. v. Dunifer, 997 F.Supp. 1235, 1241; Stephen Paul Dunifer, 11 FCC Rcd 718, 729. In addition, the statutory maximum of \$11,000 is fully warranted in light of the facts and circumstances described in paragraph 12, supra. Finally, the Small Business Regulatory Fairness Act, Pub. L. 104-121, 110 Stat. 857 ("SBREFA"), does not extend its protection to small business entities engaged in willful conduct such as Szoka's operation of an unlicensed station in direct violation of Section 301 of the Communications Act. See Section 223(b)(4) of SBREFA.

Accordingly, IT IS ORDERED that effective upon the release of this Summary Decision,⁵ Jerry Szoka SHALL CEASE AND DESIST from making radio transmissions within the United States unless and until he first obtains a license or waiver from the Federal Communications Commission.

IT IS FURTHER ORDERED that effective upon the release date of this Summary Decision, all persons in active concert or participation with Jerry Szoka SHALL CEASE AND DESIST from doing any act, whether direct or indirect, to cause unauthorized radio transmissions or to enable any such radio transmission to occur.

IT IS FURTHER ORDERED that pursuant to Section 503(b) of the Communications Act of 1934, as amended and Section 1.80 of the Commission's Rules, Jerry Szoka IS LIABLE FOR A MONETARY FORFEITURE in the amount of \$11,000 for operating an unauthorized broadcast station in violation of Section 301 of the Communications Act of 1934, as amended.

IT IS FURTHER ORDERED that pursuant to Section 503(b) of the Communications Act of 1934, as amended, this Summary Decision shall constitute an Order of Forfeiture in the amount of \$11,000.

IT IS FURTHER ORDERED that within 30 days after the date this Summary Decision becomes final, Jerry Szoka shall pay the full amount of the forfeiture by check or money order made payable to the Federal Communications Commission. The remittance should be mailed to the following address:⁶

Federal Communications Commission
Post Office Box 73482
Chicago, IL 60673-7482

IT IS FURTHER ORDERED that a copy of this Summary Decision shall be sent to Jerry Szoka by Certified Mail Return Receipt Requested.

FEDERAL COMMUNICATIONS COMMISSION



Joseph Chachkin
Chief Administrative Law Judge

⁵ 47 C.F.R. §1.103(a) (effective date of any Commission action shall be the date of public notice of such action).

⁶ This Summary Decision becomes final and this proceeding shall be terminated 50 days after its release if exceptions are not filed within 30 days thereafter, unless the Commission elects to review the case. 47 C.F.R. §1.276(b) and 47 C.F.R. §1.251(e).